



POLICE DEPARTMENT CITY OF NEW YORK

December 10, 2015

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Orlando Phillip
Tax Registry No. 940092
Patrol Borough Brooklyn South
Disciplinary Case No. 2014-12534

Charges and Specifications:

1. Said Sergeant Orlando Phillip, on or about July 9, 2013 at approximately 0410 hours, while assigned to the 69th Precinct and on duty, at the 69th Precinct located at 9720 Foster Avenue, Kings County, used offensive language in that he made a discourteous and disrespectful remark regarding Rebecca Gordon's gender by calling her, in sum and substance, a bitch.
P.G. 203-10, Page 1, Paragraph 1 - PUBLIC CONTACT- PROHIBITED CONDUCT
2. Said Sergeant Orlando Phillip, on or about July 9, 2013 at approximately 0410 hours, while assigned to the 69th Precinct and on duty, at the 69th Precinct located at 9720 Foster Avenue, Kings County, did wrongfully use force against Rebecca Gordon, in that he unlawfully used a Taser against Rebecca Gordon.
P.G. 203-11 - USE OF FORCE
3. Said Sergeant Orlando Phillip, on or about July 9, 2013 at approximately 0410 hours, while assigned to the 69th Precinct and on duty, at the 69th Precinct located at 9720 Foster Avenue, Kings County, did wrongfully use a conducted energy device against Rebecca Gordon, in that he unlawfully used a Taser against Rebecca Gordon.
P.G. 212 - USE OF CONDUCTED ENERGY DEVICE
4. Said Sergeant Orlando Phillip, on or about July 9, 2013 at approximately 0410 hours, while assigned to the 69th Precinct and on duty, at the 69th Precinct located at 9720 Foster Avenue, Kings County, abused his authority as a member of the New York City Police Department, in that he failed to obtain medical treatment for Rebecca Gordon.
P.G. 210-04, Page 2, Paragraph 5 - MEDICAL TREATMENT OF PRISONER

Appearances:

For CCRB-Administrative Prosecution Unit: Nicole Junior, Esq.
For Respondent: John D' Alessandro, Esq.

Date of Hearing(s):
June 1 and August 26, 2015

Decision:
Guilty

Trial Commissioner:
DCT Rosemarie Maldonado

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 1 and August 26, 2015. Respondent through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called Rebecca Gordon and Police Officer Lawrence DeSilva as witnesses. Respondent testified on his own behalf and offered the transcript and recording of Person A CCRB interview. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Guilty of the charged misconduct.

FINDING AND ANALYSIS

The following is a summary of the facts that are not in dispute. On or about the time at issue in this case, Rebecca Gordon was a 22 years old student at Medgar Evers College. She was 5'5" and weighed approximately 130 pounds. At 2000 hours on the evening of July 8, 2013, she went out for a late dinner with friends and fellow interns. She stayed out for approximately seven and a half hours and consumed alcohol that night. At 0330 hours the next morning, she called a taxi dispatch service for transportation to

her residence. Once the cab arrived, the driver, Person A, quoted her a fare which Gordon believed to be higher than what had been cited by the taxi dispatcher. After arguing about the fare she asked to be taken to an ATM machine to withdraw money. The driver made a quick stop at an ATM and continued to Gordon's residence. (Tr. 13-17) (See also Respondent's Exs. A, B)

The fare dispute continued and at some point during their interaction the driver took Gordon's cell phone. The driver did not return the phone and Gordon refused to pay the fare that the driver demanded. When they failed to reach an agreement, the driver drove to the 69 Precinct to request police assistance. That evening, Respondent was the 69 Precinct desk officer and Police Officer Lawrence DeSilva was the telephone switchboard operator. They were both in the vicinity of the precinct's main entrance when they heard a commotion coming from the driver's cab. (Tr. 17-22, 52, 60, 61, 107)

Both Respondent and DeSilva intervened to resolve the fare dispute and the dispatcher was called to confirm the appropriate fare. Respondent made a decision to [REDACTED]. Gordon was eventually handcuffed and escorted into the precinct. While inside, she "pulled" one of her hands out of the handcuffs. DeSilva immediately took her face down to the ground. (Tr. 23-27, 57-58, 67, 73, 107)

[REDACTED]
[REDACTED]. Gordon filed a claim against the Police Department which was settled for \$45,000. (Tr. 15, 79)

Specifications 1, 2 and 3

Specifications 1, 2 and 3 charge Respondent with discourtesy and the wrongful use of a conducted energy device. At issue is whether calling Gordon a "bitch" and then stunning her with a conducted energy device constituted misconduct. Having considered the testimony, evidence and arguments put forth by the parties I find that, under these particular circumstances, the use of this pejorative language followed by the application of a conducted energy device was misconduct. What follows is a summary of the evidence presented by the parties which is relevant to the disputed facts.

At the hearing Gordon testified that after she called the dispatcher to resolve the fare dispute, the driver "snatched" her cell phone and "in the process" hit her face. The driver threatened not to return the cell phone until the higher fare was paid and then drove to the 69 Precinct. (Tr. 17, 18, 20, 22, 23)

Outside the precinct, Respondent first spoke to The driver while she remained seated in the cab. When approached, Gordon told DeSilva that she had been assaulted. She further explained that her intent was to pay the fare but insisted that her phone be returned first. Respondent asked her to step out of the cab and Gordon replied, "I was just like, not until I get my phone, like no...." Although she was not told that she was being arrested, the officers "slammed" her against the cab, pulled her arms behind her back, cuffed her and "pushed" her into the stationhouse. (Tr. 23, 34-36)

According to Gordon, while inside the precinct one of her hands was freed from the handcuffs. She explained, "I was speaking, and I was gesturing with my hand, sort of like the way people talk with their hands...the cuffs were rather loose...I pulled my hand out. It wasn't forcefully or anything like that." She recalled being immediately "dropped to the floor" by DeSilva and being handcuffed again by three officers. Gordon admitted

that it was “wrong” to pull out her hand and averred that she did not resist DeSilva’s attempt to recuff her. It was at this point that Gordon heard Respondent yell “Oh this bitch” and observed him run toward her with a Taser in hand. Respondent then tased her with the conducted energy device causing injury to her lower back. Gordon claims that Respondent also used his knee to hit her three times in the face. (Tr. 18-22, 23-26, 39) (See also CCRB Exs. 1, 2)

CCRB presented Officer DeSilva as a witness. According to this Officer, the fare dispute was investigated by talking to the parties and the dispatcher. Respondent and DeSilva determined that the cabbie’s fare was correct and gave Gordon numerous opportunities to resolve the matter by paying the requested fare. Instead, she became “uncooperative”, “physically resist[ant]” and “irate,” and refused to exit the cab when ordered to do so. As a result, DeSilva and an unnamed “Housing officer” were forced to physically remove her from the backseat. DeSilva testified that she continued “screaming” and “kicking” her feet inside of the [rear] seat of the cab, that she was “kicking her feet toward” him so that he would not “be able to take her out [of] the vehicle.” After she was removed from the cab she began “flailing her arms” and “wiggling” and “pushing.” With the help of the Housing officer he was able to forcibly pull her hands toward her back and the Housing officer was able to rear cuff her. It took two officers to complete this maneuver. (Tr. 54, 55, 59-61, 68, 72, 89)

DeSilva and the Housing officer escorted Gordon into the precinct. Respondent followed them inside and proceeded to the desk. According to DeSilva, Gordon and Respondent began “arguing” and “screaming.” DeSilva could not remember what was said, but he believed Gordon was intoxicated. While DeSilva prepared the arrest

paperwork for Gordon, he noticed her hand "half way out [of] the cuffs." DeSilva recounted that, "I reacted, she pulled her hand out [sic] the cuffs and tried to swing her [uncuffed] hands towards my face." Although she didn't actually strike his face, he was concerned for his safety because a loose handcuff can be used as a weapon. (Tr. 52, 58, 60, 61, 65-67, 83, 91)

DeSilva testified that he grabbed Gordon's shoulder and "tactically put her on the floor." He then kneeled on the midsection of her back to keep her chest down on the floor. Gordon continued to move her hands and feet despite the officer's request that she cooperate. The Housing officer who was present continued to assist DeSilva while Respondent remained behind the desk. According to DeSilva, as they were attempting to recuff her Respondent came around the desk, kneeled next to Gordon, punched her twice in the face with a closed fist and said, "you're a crazy bitch." Respondent then "stood up," "leaned" over the front desk, "grabbed a Taser" and administered one shot directly to Gordon's back. Throughout, Gordon continued "screaming," "yelling," "crying" and making it difficult for DeSilva to handcuff her. Eventually, Gordon complied. DeSilva was aware that Gordon was injured, and saw the marks on her lower back. (Tr. 68-72, 74-76, 77, 78, 92, 94-95, 97, 101, 103)

At the hearing Respondent testified that he heard "a lot of screaming" in front of the precinct and asked DeSilva to investigate. Because he believed DeSilva was alone, he stepped outside to assist. Contrary to DeSilva's assertion, Respondent testified that there was no Housing officer at the scene. Once outside, he heard the cab driver say "she's crazy" and "she hit me with her cell phone." Gordon complained that the driver had her cell phone. Respondent attempted to resolve the fare dispute by speaking to the driver,

the taxi dispatcher and Gordon. They ascertained that Gordon was required to pay the requested fare and asked her to comply. When she refused, he decided to arrest her. Gordon began to scream and cry. According to Respondent, as he opened the cab door to remove her, Gordon kicked him in his leg. She then began "flailing her arms [and] punching." Respondent and Gordon fell to the ground during the struggle. Within minutes, they handcuffed Gordon and walked her into the precinct. (Tr. 107-110, 124)

According to Respondent, he proceeded to the desk to make the required command log entries relating to Gordon's arrest. He explained that:

As I am making my entries, I can't remember if I said anything to Ms. Gordon, I can't remember if I was upset, I can't remember -- because of the whole situation, I don't recall if -- I can't remember if -- if I did say excuse my French, my language -- the B-I-T-C-H word, if I did say that, not directly at Ms. Gordon, but in regards to the situation, that I was upset. (Tr. 110)

Respondent testified that he heard a "bang" and a "slap" and when he looked up, he no longer saw DeSilva or Gordon standing in front of the desk.¹ He immediately "grabbed" the Taser and ran to them. He observed Gordon and DeSilva on the floor and "went on the ground" in an attempt to assist. He explained that the cuff on Gordon's wrist was a "dangerous instrument" that could be used to injure them. On cross-examination, Respondent added that Gordon's "feet and hands [were] flopping.... Resisting." (Tr. 110, 111, 121)

On direct-examination Respondent testified that he applied a pressure control hold technique to subdue Gordon. Specifically, he strategically placed a fist behind Gordon's ear and exerted pressure with his thumb. (Tr. 113) On cross-examination, however, Respondent was undecided:

¹ Respondent was inconsistent with respect to whether he actually saw Gordon strike DeSilva. On cross examination he testified that he did not see Gordon strike DeSilva. He stated that he saw her swing her arms with his peripheral vision. During his CCRB interview on November 8, 2013, however, Respondent claimed that he observed Gordon strike DeSilva in the face with a closed fist. (Tr. 125-127)

- Q. ...It's your testimony Sergeant Phillip that when you first saw Ms. Gordon on the ground inside of the 69th Precinct that you applied that pressure control hold to behind her ear?
- A. Yeah, I think maybe – I think
- Q. It's a yes or no.
- A. – I did that.
- Q. It's a yes or no. You applied it behind her ear?
- A. I think I did that.
- Q. So you're not certain that you applied a pressure control hold?
- A. I might have; I might have not.... (Tr. 115-116)

Respondent also claimed that he did not recollect whether the Taser was discharged during this encounter. Respondent testified as follows on direct-examination:

...I know I had the Taser in my hand. I can't remember if it went off. I don't recall if it – if it did went off, did it touch her body? I don't know. I can't remember if I laid it down on the ground and – to try and put Ms. Gordon in cuffs, in custody, you know, but her actions – I mean, her actions was, she was a prisoner that was attempting to escape. That's what I thought, that, you know, she slipped out of her cuffs. Her next intention is she did hit well attempt to hit Officer DeSilva, and she wasn't going to stay in the precinct, she was going to run right out the door because she wanted to be – in that situation was she warranted to be tased, I – if it did? (Tr. 114)

Respondent told this tribunal that he was not aware that Gordon was injured during her arrest. (Tr. 114) He acknowledged being 6'3" and weighing at least 210 pounds at the time while Gordon was about 5'5" and weighing approximately 100 pounds. He believed that she was intoxicated that night. (Tr. 119, 120)

The Patrol Guide is controlling in this case. Section 203-11 imposes the standard to be followed when force is necessary to achieve legitimate police goals. It mandates that members of service "at the scene of a police incident" use the "minimum necessary force" and that they "employ non-lethal alternatives, as appropriate." Additionally, whenever it becomes "necessary to take a violent or resisting subject into custody,

responding officers should utilize appropriate tactics in a coordinated effort to overcome resistance.”

According to Patrol Guide Section 212-117, conducted energy devices are “classified as a less lethal device” which is “intended to augment and provide a greater margin of safety for officers who might otherwise be forced to physically subdue a dangerous subject.” As such, they “should only be used against persons who are actively physically resisting, exhibiting active physical aggression, or to prevent individuals from physically injuring themselves or other person(s) actually present.” Patrol Guide Section 212-117(16) sets forth the following factors to be considered when determining whether the use of such a device is permissible:

- a. officer/subject size disparity
- b. officer/subject strength disparity
- c. officer/subject age disparity
- d. officer’s perception of the subject’s willingness to resist
- e. officer’s perception of the immediate threat to the subject, members of the service and bystanders
- f. suspect’s violent history, if known
- g. officer’s location is a hostile environment
- h. officer’s perception of the subject being under the influence of a stimulant/narcotic which would effect pain tolerance and violence.

This tribunal has held that police actions, including Patrol Guide violations, are punishable only if a member of service acted in a vindictive or retaliatory fashion, in bad faith or “with knowledge that he was acting improperly, acted without concern for the propriety of his actions, or acted without due and reasonable care that his actions be proper.” *McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951, 425 N.Y.S.2d 61, 62 (1979); *Disciplinary Case No. 2014-11562* (September 23, 2015) The wisdom of this policy is apparent. To penalize a uniformed member of service for taking vigorous police

action in situations where close legal choices must be made could incapacitate a substantial proportion of legitimate law enforcement efforts.

In this case, however, I find that the preponderance of the credible evidence established that Respondent acted in bad faith when he called Gordon a "crazy bitch" and then touch stunned her with a conducted energy device as her torso was pinned face down to the floor by two other officers. I base this finding, in large part, on Respondent's lack of credibility as a witness, his implausible recollection of events and his failure to provide an adequate justification for the deployment of a Taser. It is this tribunal's credibility finding that the testimony presented – including Respondent's trial demeanor – seriously undercut any convincing argument that his conduct toward Gordon was both reasonable and motivated by good faith. Accordingly, I find that Respondent is guilty of the misconduct set forth in Specifications 1, 2 and 3.

From the outset I am compelled to state that this tribunal was especially troubled by Respondent's disturbingly equivocal description of his actions that night. Not only was Respondent evasive, his failure to recollect material facts felt palpably contrived to evade liability. Foremost, I do not credit Respondent's explanation: "...I know I had the Taser in my hand. I can't remember if it went off. I don't recall." For the reasons set forth below, this assertion defies belief.

First, DeSilva - a witness with no demonstrated bias or interest in the outcome of this case – convinced this tribunal that Respondent purposely discharged the Taser. As set forth in more detail above, DeSilva was clear that after he and a Housing officer had already dropped Gordon face down onto the precinct floor, and he was kneeling on her back, Respondent came around the desk, punched Gordon twice in the face, said, "you're

a crazy bitch," "grabbed a Taser" from the desk and administered one shot to Gordon's back. Second, the medical records in evidence, and the pictures of the injuries on Gordon's back, also support a finding that Respondent used the Taser on her.

Third, Respondent was in a position of authority that night. As the on-duty desk sergeant he was the person responsible for knowing the Patrol Guide procedures relating to conducted energy devices. It was his job to make an assessment and determine whether or not the conducted energy device assigned to the precinct should be used. Fourth, it was Respondent himself who purposely grabbed the Taser from its assigned location at the front desk and approached a prisoner with the device in his hand. Fifth, it was his responsibility to assess whether the Taser was deployed,² complete all required documentation of the event and make the required notifications for supervisory review. (Patrol Guide Section 212-117)

Furthermore, the use of a Taser within a precinct is an unusual incident which warrants note and triggers internal investigations. It is reasonable to expect that such an event would stand out. Under these circumstances, it is highly unlikely that Respondent could have been, as he claimed, completely oblivious as to whether or not he touch stunned Gordon with the conducted energy device he carried in his hand.

Respondent's credibility as a witness was further marred by his testimony on the use of a pejorative phrase and his alleged use of a control technique. Respondent was cagey about whether he used the word "bitch" during this encounter. Again he testified that he could "not remember" whether he had used that word but added that "if he did" it was not directed at Gordon. Particularly disturbing, however, was how the contrived vagueness of his account with respect to the Taser was mirrored in his testimony

² It is important to note that all discharges are registered in the device's internal memory. (Patrol Guide Section 212-117, p. 3, Note)

concerning his alleged use of a "pressure control point technique."³ On direct-examination, Respondent testified that he applied a pressure control point technique in the area of Gordon's ear. However, as set forth in detail above, when CCRB asked whether he had used the technique he backtracked and answered, "I might have; I might have not."

This tribunal does not believe that this is a case where the "heat of battle" truly impacted a participant's ability to recollect certain details of a physical conflict. Instead, what Respondent's doubtful assertions revealed was an attempt to conceal his potential liability and his unwillingness to be accountable for his own acts. Both are clear indicia of untruthfulness and, in this particular case, a bad faith motivation.

I could not credit certain additional details provided by Respondent at trial. Based on DeSilva's straightforward testimony I find that there was a Housing officer on the scene who helped DeSilva physically remove Gordon from the cab and that Respondent did not do so. I likewise find that the Housing officer, and not Respondent, was the person who handcuffed Gordon as she leaned against the cab, and it was that officer who helped escort her inside the precinct and assisted DeSilva after Gordon removed a cuff and was pushed onto the precinct floor. Respondent's assertions to the contrary seemed to be designed for the sole purpose of embellishing the need for additional force.

Furthermore, Respondent failed to provide a reasonable justification for using a conducted energy device in this case. In fact, at one point during his testimony he seemed to imply that Gordon was handcuffed as a result of his alleged use of a pressure point hold which preceded the use of the Taser. (Tr. 112) In this respect, DeSilva's

³ This tribunal notes that any contact Respondent might have had with Gordon's head or face was not the subject of disciplinary charges.

testimony was not as probative. It is undisputed that DeSilva was still attempting to recuff Gordon, but his testimony made it difficult to gauge her level of resistance at the moment the Taser was deployed. According to DeSilva, Respondent punched Gordon in the face twice, called her a bitch, leaned over to get the Taser and deployed it. Although Gordon's hands and feet were moving, DeSilva conceded that he had tactically maneuvered her face down onto the floor and had stabilized her torso by placing his knee on the middle of her back. Within this context, Respondent's oblique and shifty testimony did not shed light on the reasonableness of this use of force.

In making these findings I note that Gordon herself was not a credible witness. Much like Respondent, she attempted to downplay her own culpability in this incident. It is also important to acknowledge that some force was certainly necessary to handcuff Gordon once she removed her hand from the handcuff. In fact, absent the evidence of bad faith, this might have been a close case. Respondent, however, was not credible and did not provide a reasonable basis for his act.

Given the totality of circumstances in this particular case, I find that Respondent was discourteous and used a conducted energy device in bad faith and in a manner that fell far short of Department expectations for a member of service in his rank. Accordingly, I find Respondent guilty of the misconduct set forth in Specifications 1, 2 and 3.

Specification 4

Respondent is charged with failing to obtain medical treatment for Gordon. It is undisputed that an ambulance was not called to the scene and Gordon did not receive

medical attention for the injuries she sustained as a result of the tase from the conducted energy device. (Tr. 114)

Patrol Guide 212-117 is controlling here. According to section 212-117 18(a), the authorized member of the service who uses a conducted energy device on a person:

“Request[s] response of FDNY Emergency Medical Service (EMS), if person received a CED discharge. (a) Any person who has been struck by a CED dart or who has had a CED used on him or her in touch stun mode must be examined at a medical facility.”

Here, even if I were to credit Respondent’s testimony that he was unaware of any injuries that Gordon sustained, Respondent was nonetheless mandated by the Patrol Guide to request EMS to the scene. More importantly, Respondent used a “touch stun” mode on Gordon, and as such, she “must be examined at a medical facility.” Respondent did not follow the Patrol Guide’s clear protocol. Additionally, DeSilva credibly testified that he observed injuries on Gordon and prepared a medical treatment of prisoner form. CCRB also introduced medical records and photos consistent with these injuries. Accordingly, Respondent is found guilty of the misconduct set forth in Specification 4.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent’s service record was examined. See *Matter of Pell v. Board of Education*, 34 NY 2d 222 (1974). Respondent was appointed to the Department on January 9, 2006. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found guilty of all four specifications. CCRB contends that the appropriate penalty is the forfeiture of 15 vacation days. I agree. Here, Respondent’s

testimony was untruthful and evasive and failed to convince this tribunal that he acted in good faith. Furthermore, Respondent's misconduct is further compounded by his use of a gender specific obscenity right before discharging the Taser and his failure to provide the prisoner with mandated medical care. Given these circumstances, the forfeiture of fifteen (15) vacation days is a reasonable penalty.

This penalty is consistent with penalties for similar offenses. For instance, in *Case No. 2013-10851* (February 27, 2015) an eight-year police officer with no prior disciplinary record forfeited ten vacation days for striking complainant with an asp in the head without police necessity after Respondent's partner had tackled him to the ground. See also, *Case No. 2009-1137* (January 17, 2012) Nine-year sergeant with no prior disciplinary record pleaded *Nolo Contendere* and forfeits five (5) vacation days for wrongfully using a taser on an individual without assessing the circumstances of the situation and determining if the use of the device was appropriate. See further, *Case Nos. 2014-12100 & 2014-12105* (September 10, 2015) where an eighteen-year and nine-year detective with no prior disciplinary record forfeit five vacation days each for failing to obtain medical treatment for a prisoner who was undoubtedly in need of medical attention. See also, *Case No. 2014-12026* (September 2, 2015) eleven-year sergeant with no prior disciplinary record forfeits five (5) vacation days for using discourteous language during a stop.

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

FEB 04 2016

WILLIAM J. BEATON
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
SERGEANT ORLANDO PHILLIP
TAX REGISTRY NO. 940092
DISCIPLINARY CASE NO. 2014-12534

Respondent was appointed to the Department on January 9, 2006. His last three evaluations were as follows: he received an overall rating of 4.0 "Highly Competent" in 2015 and a 3.0 "Competent" in 2014 and 2013. [REDACTED]

[REDACTED]. Respondent has no medals.

He has no prior formal disciplinary record.

For your consideration.

Rosemarie Maldonado
Deputy Commissioner Trials